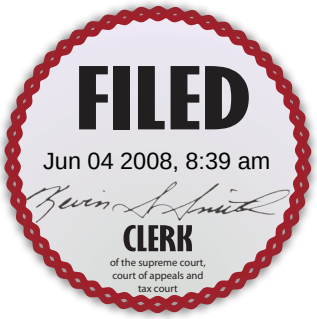

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IN THE COURT OF APPEALS OF INDIANA

GEORGE KOUKOS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0709-CR-784
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No.79D02-0612-FC-115

June 4, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, George Koukos appeals his convictions of two counts of child solicitation, both Class C felonies. Koukos raises two issues, which we restate as whether venue was proper in Tippecanoe County and whether the trial court properly allowed the State to amend the charging information after the commencement of Koukos's trial. Concluding that venue was proper in Tippecanoe county and that the trial court properly allowed the State to allow the charging information, we affirm.

Facts and Procedural History

On August 16 and 17, 2006, Detective Robert Goldsmith, of the Tippecanoe County Sheriff's Department, was working as part of the On-line Crimes Task Force in Tippecanoe County. While logged into a chat room as Daisy13_Indiana ("Daisy13"), Detective Goldsmith received messages from a person using the screen-name BurningOne@420. Detective Goldsmith later linked this screen-name to Koukos. During the conversations, Koukos asked Daisy13 her age, sex, and location. Detective Goldsmith indicated he was a thirteen-year-old female from Lafayette, Indiana. Koukos made numerous sexually-related comments, masturbated and displayed his genitalia to Daisy13 via a web-cam, and encouraged Daisy13 to contact him by telephone, web-cam, or through a computer microphone. During these conversations, Koukos was using his computer in Marion County.

On December 21, 2006, the State filed an information in Tippecanoe County charging Koukos with two counts of child solicitation as Class C felonies. The trial court held an

initial hearing and set the omnibus date for February 26, 2007.[1] On February 20, 2007, Koukos filed a motion to dismiss based on improper venue. The trial court held a hearing and subsequently denied the motion.

On June 7, 2007, the State moved to amend the charging information to reflect the proper age of the alleged victim. On June 11, 2007, at a pre-trial conference, the trial court granted this motion without objection. The trial court held a jury trial on June 12, 2007. During a conference regarding final jury instructions, the State orally moved to amend the amended complaint to allege that Koukos had committed his crimes over a computer network. This allegation was included in the original charges, but was not included in the amended charges. The use of a computer network elevates child solicitation from a Class D felony to a Class C felony. The trial court granted the State's motion over Koukos's objection.

The jury found Koukos guilty and the trial court entered judgments of conviction on both counts and sentenced Koukos to concurrent two-year sentences. Koukos now appeals his convictions.

Discussion and Decision

I. Venue

The Indiana Constitution provides that in criminal prosecutions, a defendant has a right to be tried "in the county in which the offense shall have been committed." Ind. Const. Art. I, § 13(a). A criminal defendant's right to be tried in the county where the offense was

[1] The trial court's order actually lists the omnibus date as February 26, 2008. Both parties concede

committed is also protected by statute. See Ind. Code § 35-32-2-1(a); see also Mullins v. State, 721 N.E.2d 335, 337 (Ind. Ct. App. 1999) ("[The defendant] has both a constitutional and statutory right to be tried in the county where the crime was committed."), trans. denied. The State must prove venue by a preponderance of the evidence. Baugh v. State, 801 N.E.2d `629, 631 (Ind. 2004).

It is undisputed that Koukos acted in Marion County. However, "[v]enue is not limited to the place where the defendant acted." Baugh, 801 N.E.2d at 631. Instead, "if the defendant directs acts into a county, venue is proper in that county." Id. at 632. This court has previously addressed a situation where a defendant uses the Internet in one county and solicits someone whom the defendant believes to be a minor in a second county. We held that because the defendant directed action into the second county, venue lay in that county. Laughner v. State, 769 N.E.2d 1147, 1157 (Ind. Ct. App. 2002), trans. denied, cert. denied, 538 U.S. 1013 (2003), abrogated on other grounds, Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007). Koukos argues that Laughner is distinguishable as the defendant in that case arranged a meeting in the second county and actually traveled to the second county. We recognize these differences, but do not find them to alter the fact that Koukos directed action into Tippecanoe County.

Here, Koukos directed acts into Tippecanoe County by soliciting Detective Goldsmith, whom Koukos believed to be a thirteen-year-old girl living in Tippecanoe County. In a sense, Koukos's actions are similar to a situation where one fires a gun in one

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that this error is typographical and that the omnibus date was actually February 26, 2007.

county and strikes a victim in another county. In this situation, "[t]he offense is committed in both the county where the shooting starts and the county where the victim is hit." Wurster v. State, 715 N.E.2d 341, 350 (Ind. 1999); see also Ind. Code § 35-32-2-1(b) ("If a person committing an offense upon the person of another is located in one (1) county and the person's victim is located in another county at the time of the commission of the offense, the trial may be in either of the counties."). Similarly, Koukos committed his crime both in the county where he uttered his solicitations and in the county where his victim was subjected to his solicitations.

Also, under Indiana Code 35-32-2-1(j)

> If an offense is committed by use of the Internet or another computer network (as defined in Ind. Code 35-43-2-3), the trial may be held in any county:
>
> (1) from which or to which access to the Internet or other computer network was made; or
>
> (2) in which any computer, computer data, computer software, or computer network that was used to access the Internet or other network is located.

The plain language of this section indicates that venue lies in "any county . . . in which any computer . . . that was used to access the Internet . . . is located." Here, Officer Goldsmith accessed the Internet from a computer located in Tippecanoe County. Therefore, this statute provides further indication that venue was proper in Tippecanoe County.

II. Amendment of Charges

The original charging informations indicated that Koukos "did knowingly or intentionally use a computer network to solicit an individual he believed to be a child at least fourteen (14) years of age but less than sixteen (16) years of age . . . to engage in deviate

sexual activity." Appellant's App. at 11. On June 7, 2007, the State filed a motion to amend the charging informations. In this motion, the State indicated that the charging informations should indicate that Koukos believed the child to be under fourteen years of age. This motion indicated that the charges should state that "Koukos did knowingly or intentionally solicit . . . an individual he believed to be a child under fourteen (14) years of age . . . to engage in deviate sexual conduct." Id. at 36. Therefore, the charges as identified in this motion failed to allege that Koukos solicited a child by using a computer network. The amended informations filed with the court also failed to allege that Koukos solicited a child by using a computer network. See id. at 37-38. Likewise, the Preliminary Instruction regarding child solicitation contained in the Appellant's Appendix also describes the charges without mentioning a computer network. See id. at 45. Similarly, the transcript of the trial indicates that the trial court instructed the jury on the charges without mentioning the use of a computer network. See Transcript at 40-41. During a discussion regarding the final instructions, the following exchange took place:

> [Defense]: Judge, I was looking at it and the amended count – amended counts one and two appear to me they – they don't allege the use of the computer network so our contention is that the C felony would not be appropriate.
> [Court]: Well that's interesting.
> [State]: You would be correct and I would orally move to amend that by interlineations. I accidentally left it out when I filed the amended. If you go back and reference the original count one and two it did say by use of a computer network.
> [Defense]: And we would object based on it being – that would be a substantive amendment raising the D to a C.
> [State]: However, at this morning's hearing you did approve amending it in the form made in the motion to amend, which did include that.
> [Court]: Ah, ---

> [State]: So in fact that is now an amendment of form because I simply left it out as a typographical error after we already had the hearing this morning.
> [Court]: I – I am going to – the defendant certainly was charged. It was read to the jury. The –
> [Defense]: The charges that were in the preliminaries didn't –
> [Court]: The definition was read to the jury,[2] the original charge included a computer network and the – ah – I mean it is true that there was that omission but I am going to grant the State's motion to – for a second amendment to the information and I'm going to permit the C felony to go to the jury.

Id. at 105-07. Koukos argues that the trial court improperly allowed the State to amend the charging information at this point of his trial.

The State's ability to amend a charging information is governed by Indiana Code section 35-34-1-5. The statute in effect at the time Koukos committed his crimes indicated that the State could amend an information at any time "because of any immaterial defect" and listed nine such examples, including "any miswriting, misspelling, or grammatical error." See Fajardo v. State, 859 N.E.2d 1201, 1204 (Ind. 2007). The statute also permitted the State to make amendments in form at any time as long as the amendment did not prejudice the defendant's substantial rights. Id. However, amendments of substance could be added only "upon giving written notice to the defendant, at any time up to . . . thirty (30) days if the defendant is charged with a felony . . . before the omnibus date." Id. (quoting Ind. Code § 35-34-1-5(b) (2006)).[3]

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[2] As indicated above, the definition the trial court actually read to the jury was the definition of child solicitation as a Class D felony, and not the definition of child solicitation as a Class C felony.

[3] After Fajardo was decided, the Indiana General Assembly amended Indiana Code § 35-34-1-5 so that the State may amend an information at any time prior to trial as to either form or substance, as long as the

Therefore, a determination of whether an amendment was proper begins with a classification of the amendment. Whether an amendment is one of form, substance, or in the nature of curing an immaterial defect is a question of law, which we review de novo. State v. O'Grady, 876 N.E.2d 763, 766 (Ind. Ct. App. 2007).

> An amendment is one of form and not substance if a defense under the original information would be equally available after the amendment and the accused's evidence would apply equally to the information in either form. Further an amendment is of substance only if it is essential to making a valid charge of the crime.

Id. (quoting McIntyre v. State, 717 N.E.2d 114, 125-26 (Ind. 1999)). "'Substance' is that which is essential to the making of a valid charge of crime." Souerdike v. State, 230 Ind. 192, 196, 102 N.E.2d 367, 368 (1951).

The act of soliciting a child by means other than through a computer network is classified as a Class D felony. See Ind. Code §35-42-4-6(c). The element of using a computer elevates the offense to a Class C felony. See id. ("However, the offense is a Class C felony if it is committed by using a computer network . . . ."). The charging information on file at the commencement of Koukos's trial, described in the Preliminary Instructions, and read to the jury prior to the introduction of evidence contained allegations sufficient to support a charge of child solicitation as a Class D felony, but not as a Class C felony. However, the caption on the amended charging information indicated that the State was still

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amendment does not prejudice the defendant's substantial rights. See Jewell v. State, 877 N.E.2d 864, 875 n.14 (Ind. Ct. App. 2007). However, as Koukos committed his offenses prior to this amendment, our review is based on this prior version of the statute. See Roush v. State, 875 N.E.2d 801, 806 n.2 (Ind. Ct. App. 2007). As the State amended its information after the commencement of Koukos's trial, however, it does not appear that our decision would be different under the current statute.

charging Koukos with a Class C felony. Under the child solicitation statute, the only way that the offense could be a Class C felony is if the State was alleging that Koukos solicited while using a computer. See Ind. Code § 35-42-4-6. Therefore, despite the State's inadvertent omission of the specific factual allegation that Koukos has used a computer, Koukos was clearly informed that he was being charged with child solicitation by means of a computer. Cf. Rita v. State, 663 N.E.2d 1201, 1206 (Ind. Ct. App. 1996), (recognizing that the added language "does not change the offense charged, but merely tracks the statutory language more closely," and that the defendant "was clearly informed" of the crime charged), aff'd in relevant part, 674 N.E.2d 968 (Ind. 1996).

In Pennington v. State, 523 N.E.2d 414, 416 (Ind. 1988), our supreme court held that an amendment that changed the caption of the offense from rape as a Class B felony to rape as a Class A felony was one of form. In that case, the prior information contained sufficient factual allegations to support the charge as a Class A felony. Therefore, "[b]y allowing the amendment the caption was made to conform with the actual charge made." Id. Similarly, in this case, by allowing the State to amend the allegations to conform to the caption on the instant information (and the factual allegations in the original charging informations), the State merely conformed the information to the actual charge made, as identified in the caption. Under these circumstances, we conclude that the amendment was not one of substance, but was either one to correct an immaterial defect or one of form.

As the amendment was not one of substance, we now must determine whether the

defendant was prejudiced by this amendment. Clearly he was not, as the initial charging information indicated that he had used a computer in his solicitation, the evidence introduced at trial clearly showed that he had used a computer, and he has pointed to no defense that he could have raised regarding the element of using a computer. In sum, the amendment here "did not surprise [Koukos] with a new factual allegation that he was unprepared to counter [at] trial." Haak v. State, 695 N.E.2d 944, 952 (Ind. 1998).

As the amendment was not one of substance and did not prejudice Koukos, the trial court properly allowed the State to amend the charging information after the submission of evidence at Koukos's trial.

Conclusion

We conclude that venue was proper in Tippecanoe County and that the trial court properly allowed the State to amend the charging information.

Affirmed.

FRIEDLANDER, J., concurs.

MATHIAS, J., dissents with opinion.

IN THE
COURT OF APPEALS OF INDIANA

GEORGE KOUKOS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0709-CR-784
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

Mathias, J., dissenting

I respectfully dissent.

I believe that an amendment which elevates two counts from Class D felonies to Class C felonies is, by its very nature, an amendment of substance. Based upon the holding of our supreme court in Fajardo, such an amendment could properly have been added only upon giving written notice to Koukos at any time up to thirty days before the omnibus date. See 859 N.E.2d at 1204 (citing I.C. § 35-34-1-5(b) (2006)). Here, the amendment was made not only more than thirty days beyond the omnibus date; it was made after the close of evidence at trial.

As noted by the majority, an amendment is one of substance only if it essential to making a valid charge of the crime. See Fajardo, 859 N.E.2d at 1207 (citing McIntyre, 717 N.E.2d at 125-26). Here, Koukos was charged with two counts of child solicitation. Under the applicable statute, the solicitation of a child by means other than through a computer

network is a Class D felony, but the crime is elevated if the solicitation is committed by use of a computer network. I.C. § 35-42-4-6(c). The amendment made in the present case was essential to making valid charges of Class C felony child solicitation and was therefore substantive. See Fajardo, 859 N.E.2d at 1207-08 (holding that an amendment which changed a one-count information charging Class C felony child molesting to a two-count information charging Class A felony child molesting was an amendment of substance). Thus, the trial court in the present case should not have permitted the State to amend the information at such a late date to change the allegations of child solicitation from Class D to Class C felonies.

I also believe that the majority's citation to Pennington is misplaced. In that case, the original charging information contained factual allegations that the defendant had made "threats to kill" his victim while committing rape and criminal deviate conduct. 523 N.E.2d at 415. Threatening the use of deadly force elevates these crimes from Class B to Class A felonies. However, the caption of the information listed the charged offenses as Class B felonies. On the day of trial, the State moved to change the caption to list the charged offenses as Class A felonies and to insert the words "threatening the use of deadly force, to wit:" before the already-alleged words "threats to kill her." Id. Upon appeal, our supreme court held that the amendment allowed was "more in form than in substance." Id. at 416. The amendment allowed the caption to conform with the actual charge already made and simply "lent specificity to the already existing language of the "threats to kill her.'" Id. The court emphasized that the defendant knew from the outset that he was charged with committing his crimes while threatening to kill his victim, and '[t]his fact was not changed by

the amendment." Id. Lastly, the court also noted that the trial court, after allowing the amendment, granted the defendant a four month continuance. This, the court held, was "more than ample time to meet any possible minor changes in defense strategy which might result from the amended charge." Id.

In the case before us, the State was allowed to amend the factual allegations to conform with the caption; in Pennington, the State was allowed to amend the caption to conform with the already-existing factual allegations. These are not the same thing. I recognize that the original charging information in this case did allege that Koukos had used a computer network to solicit a child. However, when this original information was amended to allege that Koukos believed the child to be under fourteen years of age, the State omitted the factual allegations that Koukos had solicited a child by use of a computer network. Whether this omission by the State was "inadvertent" is irrelevant to the issue of whether the amendment was one of substance. The fact remains that during Koukos's trial, the charging information and even the preliminary jury instructions did not mention the factual allegations that Koukos used a computer network. The amendment allowed by the trial court here did not simply change the caption to conform with factual allegations as contained in the then-current charging information.

In short, I would hold that the amendment allowed by the trial court was one of substance and not of form. Under Fajardo, such a substantive amendment should not have been allowed without written notice to Koukos at least thirty days prior to the omnibus date. I would therefore reverse and remand with instructions that the trial court vacate Koukos's

convictions for Class C felony child solicitation and instead enter judgments of conviction for Class D felony child solicitation.